

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA,
Plaintiff,
v.
JAQUAN JACKSON,
Defendant

Case No. CR22-37RSL

ORDER DENYING
DEFENDANT'S MOTION
TO DISMISS INDICTMENT

This matter comes before the Court on defendant's "Motion to Dismiss the Indictment for Unconstitutionality" (Dkt. # 67). Having reviewed the submissions of the parties and the remainder of the record, the Court finds as follows:

I. Government's Motion for Overlength Brief

As an initial matter, the Court GRANTS the government's motion to file a brief in excess of twelve pages. Dkt. # 70.

II. Background

On March 16, 2022, a federal grand jury returned an indictment charging defendant with a single count of felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). Dkt. # 1. Defendant now moves this Court to dismiss the indictment, arguing that § 922(g)(1) violates the Second Amendment under the Supreme Court’s recent decision in *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111 (2022).

Defendant argues that *Bruen* “compels the conclusion that § 922(g)(1) impermissibly infringes upon the Second Amendment right to lawful self-defense.” Dkt. # 67 at 3. Specifically,

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1 he contends that *Bruen* (1) abrogates the Ninth Circuit’s means-end test for firearm regulations
 2 and assumptions that certain types of regulations are constitutional and (2) shows that
 3 § 922(g)(1) violates the Second Amendment because defendant’s “conduct triggers the
 4 Amendment’s plain text” and “the government cannot meet its burden to show that § 922(g)(1)
 5 complies with the Nation’s tradition of firearm regulation.” Dkt. # 67 at 3-4. The government
 6 responds that Ninth Circuit law upholding the constitutionality of the statute remains controlling
 7 law after *Bruen* and, even if the statute were unconstitutional as applied to differently situated
 8 defendants, it is constitutional as applied to defendant. Dkt. # 71 at 2.

9 Rule 12(b)(1) of the Federal Rules of Criminal Procedure provides that “[a] party may
 10 raise by pretrial motion any defense, objection, or request that the court can determine without a
 11 trial on the merits.” A pretrial motion is proper when “it involves questions of law rather than
 12 fact.” *United States v. Shortt Accountancy Corp.*, 785 F.2d 1448, 1452 (9th Cir. 1986) (internal
 13 citations omitted). Accordingly, the Court addresses defendant’s challenge to § 922(g)(1) below.

14 **III. Felon in Possession Laws and the Second Amendment**

15 The Second Amendment provides that “[a] well regulated Militia, being necessary to the
 16 security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”
 17 U.S. CONST. amend. II. In *District of Columbia v. Heller*, the Supreme Court held that the right
 18 to “keep and bear arms” is an individual right. 554 U.S. 570, 573-626 (2008). However, the
 19 Court noted that, like other individual rights, “the right secured by the Second Amendment is
 20 not unlimited.” *Id.* at 626. Most notably for this Order, the Court explicitly cautioned that
 21 “nothing in [Heller] should be taken to cast doubt on longstanding prohibitions on the
 22 possession of firearms by felons and the mentally ill.” *Id.* Indeed, the Court described such
 23 restrictions as “presumptively lawful regulatory measures.” *Id.* at 627 n.26.

24 The Court re-emphasized this holding in two years later in *McDonald v. Chicago*,¹
 25 stating:

26
 27 ¹ In *McDonald v. Chicago*, the Court concluded that the Fourteenth Amendment incorporates the
 28 Second Amendment right, recognized in *Heller*, to keep and bear arms for the purpose of self-defense.
 561 U.S. 742.

1 We made it clear in *Heller* that our holding did not cast doubt on such
 2 longstanding regulatory measures as “prohibitions on the possession of
 3 firearms by felons and the mentally ill,” “laws forbidding the carrying of
 4 firearms in sensitive places such as schools and government buildings, or
 5 laws imposing conditions and qualifications on the commercial sale of
 6 arms.” We repeat those assurances here.

7 561 U.S. 742, 786 (2010) (internal citations omitted).

8 With these pronouncements in mind, the Court turns to the text of the challenged statute,
 9 § 922(g)(1), which reads:

10 It shall be unlawful for any person . . . who has been convicted in any court
 11 of, a crime punishable by imprisonment for a term exceeding one year . . .
 12 to ship or transport in interstate or foreign commerce, or possess in or
 13 affecting commerce, any firearm or ammunition; or to receive any firearm
 14 or ammunition which has been shipped or transported in interstate or
 15 foreign commerce.

16 18 U.S.C. § 922(g)(1). Defendant is not the first to argue that this statute violates his Second
 17 Amendment rights. In *United States v. Vongxay*, defendant Peter Vongxay appealed his
 18 conviction for felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1), challenging
 19 his conviction on three grounds, the first of which was that, under *Heller*, § 922(g)(1) violates
 20 the Second Amendment. 594 F.3d 1111, 1113-15 (9th Cir. 2010). The Ninth Circuit interpreted
 21 *Heller* to support the conclusion that “felons are categorically different from the individuals who
 22 have a fundamental right to bear arms, and [thus] Vongxay’s reliance on *Heller* is misplaced.”
 23 *Id.* at 1115. The court also examined its own prior precedent, decisions from other circuits, the
 24 text of the Second Amendment, and scholarly works discussing the history of the Amendment
 25 and firearms regulations in the United States more broadly. *Id.* at 1116-18. Concluding that
 26 these sources supported the constitutionality of § 922(g)(1), the Ninth Circuit held “that
 27 § 922(g)(1) does not violate the Second Amendment as it applies to Vongxay, a convicted
 28 felon.” *Id.* at 1118. The Ninth Circuit has since reaffirmed this holding. *See United States v. Phillips*, 827 F.3d 1171, 1175 (9th Cir. 2016) (stating that, “under Supreme Court precedent and our own,” the court “must” “assum[e] the propriety of felon firearm bans”); *Van Der Hule v.*

1 *Holder*, 759 F.3d 1043, 1051 (9th Cir. 2014) (“§ 922(g)(1) continues to pass constitutional
2 muster”).

3 Published decisions of the Ninth Circuit are binding on this Court. *Gonzalez v. Arizona*,
4 677 F.3d 383, 389 n.4 (9th Cir. 2012) (en banc). Thus, unless the Ninth Circuit precedent
5 discussed above is overruled, it requires denial of defendant’s motion. *Id.*

6 Defendant argues that while *Vongxay* and other relevant Ninth Circuit precedent have not
7 been explicitly overruled, they fall under a “recognized exception[] to the law of the circuit
8 rule.” *Id.* Specifically, the Ninth Circuit has held “where the reasoning or theory of [a] prior
9 circuit authority is clearly irreconcilable with the reasoning or theory of intervening higher
10 authority,” that precedent should be rejected as having been “effectively overruled.” *Miller v.*
11 *Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc). Here, defendant argues that the reasoning
12 put forward in *Bruen* is “clearly irreconcilable” with that of the Ninth Circuit’s pre-*Bruen* cases,
13 and thus those cases should be considered “effectively overruled. Dkt. # 67 at 4-11.

14 However, in applying the holding of *Miller*, the Ninth Circuit has emphasized that the
15 “clearly irreconcilable” requirement “is a high standard.” *Fed. Trade Comm’n v. Consumer Def.*,
16 *LLC.*, 926 F.3d 1208, 1213 (9th Cir. 2019) (quoting *Rodriguez v. AT & T Mobility Servs. LLC*,
17 728 F.3d 975, 979 (9th Cir. 2013)). “It is not enough for there to be some tension between the
18 intervening higher authority and prior circuit precedent, or for the intervening higher authority to
19 cast doubt on the prior circuit precedent.” *Close v. Sotheby’s, Inc.*, 894 F.3d 1061, 1073 (9th Cir.
20 2018) (citation omitted). “So long as the court can apply [the] prior circuit precedent without
21 running afoul of the intervening authority it must do so.” *Id.* (citation omitted).

22 Thus, the issue before this Court is whether *Bruen* is “clearly irreconcilable” with *Heller*
23 and pre-*Bruen* Ninth Circuit precedent relying on *Heller* that addresses the constitutionality of
24 § 922(g)(1).

25 **IV. Ninth Circuit Precedent After *Bruen***

26 The Supreme Court built on its holdings in *Heller* and *McDonald* in *Bruen*, concluding
27 “that the Second and Fourteenth Amendments protect an individual’s right to carry a handgun
28 for self-defense outside the home.” 142 S. Ct. at 2122. The Court found that New York’s gun
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1 licensing scheme violated this right, as the state issued “public-carry licenses only when an
 2 applicant demonstrate[d] a special need for self-defense.” *Id.*

3 In *Bruen*, the Court also announced the “standard for applying the Second Amendment.”
 4 *Id.* at 2129. In the wake of *Heller*, circuit courts had adopted a “two-step” framework “for
 5 analyzing Second Amendment challenges that combine[d] history with means-end scrutiny.” *Id.*
 6 at 2125. The Court held that the two-step approach was “one step too many.” *Id.* at 2127.
 7 Instead, the Court emphasized that Second Amendment analyses should focus on history:

8 In keeping with *Heller*, we hold that when the Second Amendment’s plain
 9 text covers an individual’s conduct, the Constitution presumptively protects
 10 that conduct. To justify its regulation, the government may not simply posit
 11 that the regulation promotes an important interest. Rather, the government
 12 must demonstrate that the regulation is consistent with this Nation’s
 13 historical tradition of firearm regulation. Only if a firearm regulation is
 14 consistent with this Nation’s historical tradition may a court conclude that
 15 the individual’s conduct falls outside the Second Amendment’s
 16 “unqualified command.”

17 *Id.* at 2126 (quoting *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 50 n.10 (1961)). The Court is
 18 not convinced that the approach announced in *Bruen* is “clearly irreconcilable” with *Heller* and
 19 the Ninth Circuit precedent that relied on *Heller* to uphold the constitutionality of § 922(g)(1).

20 First, *Bruen*’s text indicates that it does not undercut *Heller*’s conclusion that regulating
 21 the possession of firearms by felons is presumptively lawful. Indeed, the majority opinion
 22 describes itself as “consistent with *Heller*” and “in keeping with *Heller*.” *Id.* at 2122, 2126.
 23 Furthermore, the *Bruen* opinion “describ[es] those who fall under the Amendment’s aegis as
 24 ‘law-abiding’ citizens no fewer than twenty-one times” *United States v. Ramos*, No. CR21-
 25 395RGK, Dkt. # 31 at 2 (C.D. Cal. Aug. 5, 2022); *see, e.g.*, *Bruen*, 142 S. Ct. at 2133
 26 (describing part of the Second Amendment analysis as asking, “how and why the regulations
 27 burden a *law-abiding citizen*’s right to armed self-defense” (emphasis added)). The concurring
 28 and dissenting opinions similarly indicate that the Court’s conclusion in *Heller* remains
 unaffected by *Bruen*. *See Bruen*, 142 S. Ct. at 2157 (Alito, J., concurring) (stating “[n]or have
 we disturbed anything that we said in *Heller* or *McDonald* . . . about restrictions that may be

1 imposed on the possession or carrying of guns"); *id.* at 2162 (Kavanaugh, J., concurring)
 2 (stating "as *Heller* and *McDonald* established and the Court today again explains, the Second
 3 Amendment 'is neither a regulatory straightjacket nor a regulatory blank check' . . . 'nothing in
 4 our opinion should be taken to cast doubt on longstanding prohibitions on the possession of
 5 firearms by felons'"); *id.* at 2189 (Breyer, J., dissenting) (stating "[I]like Justice Kavanaugh, I
 6 understand the Court's opinion today to cast no doubt on" *Heller*'s holding that prohibitions on
 7 the possession of firearms by felons are presumptively lawful).

8 Second, while defendant argues that "*Bruen* also abrogated prior case law relying on
 9 'presumptively lawful' exceptions to the Second Amendment," the Court is not persuaded. Dkt.
 10 # 67 at 8. Defendant argues that the "non-exhaustive list of 'presumptively lawful regulatory
 11 measures'" identified in *Heller* "included 'prohibitions on carrying concealed weapons.'" *Id.* at
 12 9. He contends that because the *Bruen* Court then conducted an "exhaustive historical analysis"
 13 of a state licensing regime regulating both open and concealed carrying of firearms, this is
 14 conclusive evidence that "*Heller*'s preliminary list of Second Amendment exceptions do not
 15 bind future courts or prevent them from conducting a full historical review that may point to a
 16 different conclusion." *Id.* at 9-10. The Court identifies at least two problems with defendant's
 17 theory. First, the Court disagrees that "prohibitions on carrying concealed weapons" *were* part of
 18 the list of "presumptively lawful regulatory measures" identified by the *Heller* Court.² Thus, the
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20 ² The *Heller* opinion states:

21 Like most rights, the right secured by the Second Amendment is not unlimited.
 22 From Blackstone through the 19th-century cases, commentators and courts
 23 routinely explained that the right was not a right to keep and carry any weapon
 24 whatsoever in any manner whatsoever and for whatever purpose. For example,
 25 the majority of the 19th-century courts to consider the question held that
 26 prohibitions on carrying concealed weapons were lawful under the Second
 27 Amendment or state analogues. Although we do not undertake an exhaustive
 28 historical analysis today of the full scope of the Second Amendment, nothing in
 our opinion should be taken to cast doubt on longstanding prohibitions on the
 possession of firearms by felons and the mentally ill, or laws forbidding the
 carrying of firearms in sensitive places such as schools and government buildings,
 or laws imposing conditions and qualifications on the commercial sale of arms.

1 fact that the Court later conducted a more thorough historical analysis of this type of restriction
 2 does not cast doubt on the continuing viability of the “presumptively lawful” regulations
 3 identified in *Heller*. Second, *Bruen*’s discussion of “sensitive places” regulations (another
 4 regulation that was noted as “presumptively lawful” in *Heller*) reinforces the conclusion that the
 5 Court continues to view these exceptions as enduring. *See Bruen*, 142 S. Ct. at 2133-34.

6 Finally, defendant argues that because *Bruen* prohibited the use of means-end analysis in
 7 the Second Amendment context, any circuit precedent that relied on such a test is “clearly
 8 irreconcilable” and thus effectively overruled. Dkt. # 67 at 4. However, in *Vongxay*, the Ninth
 9 Circuit relied on *Heller*, the text of the Second Amendment, and historical understanding to
 10 conclude that § 922(g)(1) did not violate the Second Amendment. 594 F.3d at 1116-18. At no
 11 point did the court perform a means-end analysis. *Id.* The Court acknowledges that the Ninth
 12 Circuit “recognize[d] . . . that the historical question has not been definitively resolved,” 594
 13 F.3d at 1118. However, “that limited tension between *Vongxay* and *Bruen* is not enough to find
 14 that *Bruen* ‘effectively overruled’ *Vongxay*.” *United States v. Siddoway*, No. CR 21-205BLW,
 15 2022 WL 4482739, at *2 (D. Idaho Sept. 27, 2022).³

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18 554 U.S. at 626 (internal citations omitted). The structure of the paragraph clearly shows that the Court’s
 19 discussion of “concealed weapons” is distinct from the list of “longstanding prohibitions” that are
 20 “presumptively lawful.” *See McDonald*, 561 U.S. at 786 (citing to *Heller* and listing only the
 21 prohibitions on possession of firearms by felons and the mentally ill, laws forbidding the carrying of
 22 firearms in sensitive places, and laws impose conditions and qualifications on the commercial sale of
 23 arms as presumptively lawful); *see also* Carlton F.W. Larson, *Four Exceptions in Search of a Theory: District of Columbia v. Heller and Judicial Ipse Dixit*, 60 HASTINGS L.J. 1371, 1372 (2009) (calling “the exceptions in this statement the four *Heller* exceptions”) (cited in Justice Breyer’s dissenting opinion in *Bruen*); David B. Kopel & Joseph G.S. Greenlee, *The “Sensitive Places” Doctrine: Locational Limits on the Right to Bear Arms*, 13 CHARLESTON L. REV. 205, 207 (2018) (explaining that the “sensitive places” exception is “part of a list of three types of ‘presumptively lawful regulatory measures’” announced in *Heller*) (cited in the *Bruen* majority opinion).

24
 25
 26 3 The Court also recognizes that both a Supreme Court Justice and the Ninth Circuit have
 27 acknowledged the mixed historical evidence for “categorical, lifetime bans on firearm possession by all
 28 ‘felons.’” *Phillips*, 827 F.3d at 1174 & n.2; *Bruen*, 142 S. Ct. at 2189 (Breyer, J., dissenting). Although defendant would like the Court to scrutinize the history of felon-in-possession statutes, such examination is unnecessary at this time. The Court is bound by *Vongxay* and the motion must be denied.

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1 The Court joins with other district courts in this circuit⁴ in finding that the reasoning of
2 *Vongxay* and *Heller*—on which *Vongxay* relies—are not “clearly irreconcilable with the
3 reasoning or theory” of *Bruen*. Accordingly, *Bruen* did not “effectively overrule” *Vongxay* and
4 this Court is bound by *Vongxay* and its progeny. For this reason, the motion to dismiss is denied.

5 **V. Conclusion**

6 For all the foregoing reasons, defendant’s motion to dismiss the indictment (Dkt. # 67) is
7 DENIED. The government’s motion to file an overlength brief (Dkt. # 70) is GRANTED.

8 IT IS SO ORDERED.

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10 DATED this 13th day of February, 2023.

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13 Robert S. Lasnik
14 United States District Judge

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⁴ See, e.g., *United States v. Moore*, No. CR20-747KJI (D. Or. Jan. 11, 2023); *United States v. Butts*, No. CR22-3DWM (D. Mont. Oct. 31, 2022); *United States v. Carleson*, No. CR22-32SLG (D. Alaska Oct. 28, 2022); *United States v. Siddoway*, No. CR21-205BLW (D. Idaho Sept. 27, 2022); *United States v. Hill*, No. CR21-107WQH (S.D. Cal. Sept. 20, 2022); *United States v. Nevins*, No. CR19-774DMG (C.D. Cal. Aug. 15, 2022).